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DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD-2012-OS-0129]

Manual for Courts-Martial; Proposed Amendments

AGENCY: Joint Service Committee on Military Justice (JSC),
Department of Defense.

ACTION: Notice of response to public comments on proposed amendments to the Manual for Courts-Martial, United States (2012 ed.) (MCM) .

SUMMARY: The Joint Service Committee on Military Justice (JSC) is publishing final proposed amendments to the Manual for Courts-Martial, United States (MCM) to the Department of Defense. The proposed changes concern the rules of procedure and evidence and the punitive articles applicable in trials by courts-martial. These proposed changes have not been coordinated within the Department of Defense under DoD Directive 5500.1, "Preparation, Processing and Coordinating Legislation, Executive Orders, Proclamations, Views Letters and Testimony," June 15, 2007, and do not constitute the official position of the Department of Defense, the Military Departments, or any other Government agency.

ADDRESSES: Comments and materials received from the public are available for inspection or copying at the Joint Services Policy

and Legislation Section, Military Justice Division, AFLOA/JAJM, 1500 West Perimeter Road, Suite 1130, Joint Base Andrews, Maryland, 20762, between 9 a.m. and 4 p.m. Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Background

On October 23, 2012 (77 FR 64854-64887), the JSC published a Notice of Proposed Amendments concerning the rules of procedure and evidence and the punitive articles applicable in trials by courts-martial and a Notice of Public Meeting to receive comments on these proposals. The public meeting was held on December 11, 2012. One member of the public appeared. Several comments were received via electronic mail and were considered by the JSC.

Discussion of Comments and Changes

The JSC considered each public comment, and after making minor modifications, the JSC is satisfied that the proposed amendments are appropriate to implement. Comments that were

submitted that are outside the scope of these proposed changes will be considered as part of the JSC's 2013 annual review of the MCM. The JSC will forward the public comments and proposed amendments to the Department of Defense. The public comments regarding the proposed changes follow:

a. One commenter recommended adding the words "to the victim's privacy" to RCM 405(i)(2)(B)(iv) after "unfair prejudice" when discussing when MRE 412(b) evidence is admissible. Due to the rescission of the proposed change to MRE 412 in the previous year's proposed changes, and its reversion back to its original substance, the JSC has not adopted this proposal. Instead, the JSC will make a different change to RCM405(i)(2)(B), to read as follows:

"(B) *Procedure to determine admissibility.* The procedure to determine admissibility can be found in Mil. R. Evid. 412(c)."

b. One commenter recommended amending the Analysis to MRE 412. The JSC has not adopted this proposal due to the change to the 2012 change, involving the Military Rules of Evidence, in which MRE 412 was not changed and reverted back to its original substance. Instead the JSC proposes to add the following discussion to the Analysis to MRE 412:

"In 2011, the Court of Appeals for the Armed Forces expressed concern with the constitutionality of the balancing test from Rule 412(c)(3) as amended in 2007. *See United States*

v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011), *United States v. Ellerbrock*, 70 M.J. 314 (C.A.A.F. 2011)."

c. One commenter suggested the portion of RCM 405(i) that requires the investigating officer to determine admissibility of MRE 412 evidence by determining whether the "probative value of such evidence outweighs the danger of unfair prejudice" is confusing and should instead read that the "probative value of such evidence outweighs the danger of unfair prejudice or *confusion of the issue*." However, due to the rescission of the proposed change to MRE 412 in the proposed changes submitted in 2011, and its reversion back to its original substance, the JSC has not adopted this proposal. Instead RCM 405(i)(2)(B) will now be amended as stated in paragraph a, *supra*.

d. One commenter recommended amending the sample specifications under Article 120, UCMJ, Paragraphs f.(7)(a) - (f) to include "(arouse) (gratify the sexual desire of)" to correspond to the elements under Abusive Sexual Contact. In addition, based on this comment, JSC noted the same inconsistency in Paragraphs f.(5)(a) - (e). Article 120, UCMJ, Paragraphs f.(5) and (7) will be amended to include the language in the sample specifications.

e. Comments making grammatical corrections were received. Those corrections were made.

f. Comments were received suggesting additional amendments to RCMs 307, 405, 701, 703, 905, 906, 907, 908, 1003, 1004; the Analysis to MREs 513 and 514; Article 120; and Part IV, paragraph 16e pertaining to Article 92, UCMJ. These suggested changes were not incorporated. Several suggested changes were not contemplated in the proposals currently under review. Those suggestions will be considered in the course of the FY13 annual review of the MCM, which is required by DoD Directive 5500.17.

Dated: February 28, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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